Supreme Court, U.S
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97 709 OCT - 9 1997

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1997 TERM

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C.W. SMITH, SMITH'S LAKE CORPORATION and

GRADY SMITH, Petitioners,

vs.

GWINNETT COUNTY, GEORGIA, Respondent.

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On Petition for Writ of Certiorari to the

Supreme Court of Georgia

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HOPP

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the trial court's Order for Contempt, Injunctive, and Other Equitable Relief resulted in a taking of the Petitioners' property for public use which requires just compensation pursuant to the Takings Clause of the Fifth Amendment made applicable to the States by the Fourteenth Amendment to the United States Constitution?

(2) Whether the trial court's Order for Contempt, Injunctive, and Other Equitable Relief authorizing the trial court to take control of the Petitioners' property and Respondent to repair the dam and restore the lake and buffers at the Petitioners' expense was a valid exercise of police powers and substantially advanced a legitimate state interest as required by Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and the Fifth and Fourteenth Amendments to the United States Constitution?

(3) Whether the trial court's Order for Contempt, Injunctive, and Other Equitable Relief authorizing the trial court to take control of the Petitioners' property and Respondent to repair the dam and restore the lake and buffers at the Petitioners' expense pursuant to the court's equitable powers requires just compensation under the Takings Clause of the Fifth Amendment made applicable to the States by the Fourteenth Amendment to the United States Constitution because this government action results in a taking of the Petitioners' property for public use?

LISTING OF ALL PARTIES

Petitioner SMITH'S LAKE CORPORATION has no parent companies and no subsidiaries.

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BASIS FOR JURISDICTION

The trial court's Order on Contempt, Injunctive, and Other Equitable Relief entered on October 15, 1996 was affirmed in Docket Number S97A0388 in the Georgia Supreme Court on June 2, 1997. Smith et al. v. Gwinnett County, 268 Ga. 179, __ S.E.2d __ (1997). The Georgia Supreme Court denied the Petitioners' Motion for Reconsideration on July 11, 1997.

The United States Supreme Court has jurisdiction in the instant Petition for Writ of Certiorari because Petitioner raises compelling issues dealing with the taking of their real property for public use without just compensation in violation of the Fifth and the Fourteenth Amendments to the United States Constitution and the Supreme Court of Georgia has decided important questions of federal constitutional law in a way that conflicts with the decisions of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

A. UNITES STATES CONSTITUTION

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, not shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT; Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. GEORGIA STATUTES

O.C.G.A. 23-1-7 Equity to Do Complete Justice:

Equity seeks always to do complete justice. Hence, having the parties before the court rightfully, it will proceed to give full relief to all parties in reference to the subject matter of the action, provided the court has jurisdiction for that purpose.

O.C.G.A. 23-4-37 Enforcement by Execution or Attachment:

Every decree or order of a superior court in equitable proceedings may be enforced by attachment against the person for contempt. Decrees for money may be enforced by

execution against the property. If a decree is partly for money and partly for the performance of a duty, the former may be enforced by execution and the latter by attachment or other process.

C. GWINNETT COUNTY ORDINANCES

1. "The Development Regulations of Gwinnett County, Georgia," adopted January 5, 1988, Article 2, Definitions, Section 2.2 Definitions of Words and Phrases:

Clearing - The removal of trees or other vegetation, but not including grubbing activities.

Development - 1. (Verb) All activities associated with the conversion of land or the expansion or replacement of an existing use to any new use intended for human operation, occupancy or habitation, other than for agricultural purposes devoted strictly to the cultivation of the land, dairying or animal husbandry. Such activities include land disturbance (clearing and grubbing the land of vegetation and stumps, and grading) and the construction of improvements such as but

not limited to streets, driveways or parking areas, water or sewer mains, storm water drainage facilities, sidewalks or other structures permanently placed on or in the property. 2. (Noun) Where appropriate to the context, the term "development" also may be used to denote a specific subdivision or project which is a single entity or intended to be constructed as in interrelated whole, whether simultaneously or in phases.

Development Permit - An official authorization issued by the Department permitting clearing, grubbing, grading, or construction of storm drainage facilities, access drives, streets, parking or other improvements exclusive of buildings.

Grading - The movement, removal or addition of earth on a site by the use of mechanical equipment.

Grading Permit - An official authorization issued by the Department permitting grading of a site, and may include installation of attendant storm water drainage facilities.

Grubbing - The removal of stumps or roots from a property.

Land Disturbance Permit - Any permit other than a building permit issued by Gwinnett County that authorizes clearing or grading activities on a site or portion of a site. Said permit may be a Clearing, Clearing and Grubbing, a Grading, or Development Permit as defined and authorized herein.

Article 4 Permits Required for Development or Construction

Section 4.1.1: Permit Required; Exemptions

No disturbance of the land, including clearing, grubbing, or grading activities, shall commence or proceed except in accordance with the provisions of these Development Regulations, unless the activity is exempt as an agricultural activity in the RA-200 zoning district, or is for the construction of an individual single-family detached or duplex residence on a buildable lot of record.

Section 4.2. Land Disturbance Permits

4.2.1 Clearing Permit, Clearing and Grubbing Permit, and Grading Permit.

Section 4.2.2 Development Permit

a. Development Activities Authorized

A Development Permit shall be issued to authorize all activities associated with the land development process, including clearing and grubbing, grading, and the construction of such improvements as streets, surface parking areas and drives, sewer systems, storm water drainage facilities, sidewalks, or other structures permanently placed on or in the property except for buildings or other structures requiring the issuance of a building permit. Water system improvements shall be authorized solely by the Public Utilities Department.

2. "The 1985 Zoning Resolution of Gwinnett County, Georgia," as revised December 1994:

Article III Definitions:

Buffer. Land area used to visibly separate one use from another through screening and distance; to shield or block noise, light, glare, or visual or other conditions; to block

physical passage to non-similar areas; or to reduce air pollution, dust, dirt, and litter.

Section 606 Buffer Between Dissimilar Districts:

Section 606.1 A buffer shall be required for the following:

1. All property zoned for commercial, neighborhood shopping, office institutional, office business parks or industrial uses shall have a buffer along any rear and side property lines abutting a residential district.

STATEMENT OF THE CASE

A. THE FREEMAN LAKE PROPERTY: Petitioners C.W. Smith and Grady Smith are brothers. C.W. Smith owns all of the stock in Petitioner Smith's Lake Corporation. In April 1995, Smith's Lake Corporation acquired a fee simple interest in a seventy acre parcel of land located in Gwinnett County, Georgia. The dominant feature of this property is a fifty acre lake known as Freeman Lake (the entire property will be referred to as the "Freeman Lake Property"). In April 1995, there was an existing dam on the Freeman Lake Property. Beaver Ruin Creek flows into Freeman Lake.

The Freeman Lake Property is zoned C-2 commercial, general business. The property adjacent to the Freeman Lake Property is residential. The Freeman Lake Property is bordered on one side by a residential subdivision and Plantation Lane and bordered on the opposite side by a residential subdivision and Arcadia Drive. The Zoning Resolution of Gwinnett County requires a seventy-five foot

natural buffer area to be maintained on commercial property when it is adjacent to property zoned residential. Respondent contends that the dam only extends along a portion of the property, on the Plantation Lane side of Freeman Lake.

Freeman Lake has been designated as a flood way by the Federal Emergency Management Agency (FEMA). It is a designated wetlands area regulated by the Army Corps of Engineers (ACOE). The Georgia Department of Natural Resources has periodically inspected the dam but has declined jurisdiction over it.

B. DAM REPAIRS: The Petitioners have some prior knowledge of dams. After acquiring the Freeman Lake Property, the Petitioners undertook to repair the existing dam. In order to accomplish this, the Petitioners breached the dam, drained Freeman Lake and hauled in numerous loads of dirt and other fill material to use to repair the dam. Water needed to be drained from Freeman Lake to facilitate the repairs. The Petitioners dug trenches in the bottom of

Freeman Lake and began a clean up of the lake bottom and elsewhere by removing stumps and trees and debris.

In April, 1995, Gwinnett County advised Petitioners that there is no County Regulation which would prevent the draining of Freeman Lake. Respondent also advised that if Petitioners planned to do any type of construction on the Freeman Lake Property, permits must be obtained from Gwinnett County, FEMA, and ACOE.

C. LITIGATION: Petitioners continued to repair the dam without a County permit. Respondent initiated litigation seeking equitable relief in the Superior Court of Gwinnett County in Civil Action Number 95-A-5000. In addition, the County issued numerous citations against the Petitioners for violations of regulations, but Petitioners were subsequently acquitted of some and some were not prosecuted.

(1) T.R.O.: Gwinnett County filed a petition for injunctive relief and obtained a Temporary Restraining Order on August 2, 1995. (Appendix). The Temporary Restraining

Order provided that Petitioners are restrained and enjoined for a period of thirty (30) days or until further order of the court, whichever is sooner, from engaging in any construction activity, including grading, excavating, repairing the dam, cutting, destroying or otherwise harming any of the trees or vegetation located on the Freeman Lake Property and breaching or repairing the dam or allowing water from Beaver Ruin Creek from entering Freeman Lake. The court scheduled a hearing for the request for an Interlocutory Injunction.

(2) INTERLOCUTORY INJUNCTION: At the hearing on the Interlocutory Injunction, Respondent raised concerns about the Petitioners' activities in repairing the dam. Respondent's concerns were that these repairs were being conducted without Petitioners first having obtained a Land Disturbance Permit from the County, that the repairs were commenced with no engineering study to ensure that the dam was safely constructed, and that Petitioners were destroying

the required seventy-five foot natural buffer areas between the commercial Freeman Lake Property and the adjoining residential subdivisions. Respondent raised concerns about possible flooding over Plantation Lane that may result if Petitioners improperly constructed the emergency spill way and catch basin or improperly repaired the dam. Respondent was also interested in whether the Petitioners intended to commercially develop the Freeman Lake Property. The County expressed its desire to have Freeman Lake remain intact. (8/31/95 T.).

The Petitioners indicated that there were no plans to commercially develop the property and the repair activities did not involve a new use for the Freeman Lake Property. The Petitioners argued that they were not required to obtain a Land Disturbance Permit in order to repair an existing dam because there was no "development" or "new use" as defined in the County regulations. The Petitioners argued that an engineering study was not necessary because of the limited

nature of their intended repairs. The Petitioners' intention was to repair the dam to make it safe and to restore Freeman Lake to its original condition. The County had been satisfied with the dam as it existed prior to the Petitioners acquiring the Freeman Lake Property and that it complied with all applicable regulations. Petitioners acknowledged that as owners, they would be responsible and liable for any damages caused by an unsafe dam. In short, Petitioners argued that, as owners of the Freeman Lake Property, they had the right to undertake to repair the existing dam located on their property and to restore their lake, and that Gwinnett County could inspect the repairs when completed and take appropriate action if the dam was not safe. (8/31/95 T.).

The trial court converted the Temporary Restraining Order into an Interlocutory Injunction on September 11, 1995. (Appendix). The court found that the Respondent has certain responsibilities to all Gwinnett County residents to maintain the health, safety, and welfare of its citizens. The

trial court restrained and enjoined Petitioners from engaging in any construction activity, including grading, excavating, repairing the dam, cutting, destroying or otherwise harming any of the trees or vegetation located on the Freeman Lake Property and breaching or repairing the dam until such time as Petitioners receive a Land Disturbance Permit from Gwinnett County. The order provided that, without court intervention, the Petitioners could obtain written approval from the County to conduct activities in contravention of the order if the County determined this was in the County's best interests.

(3) CONSENT ORDER: Respondent subsequently filed a Motion to Compel Discovery and a Motion for Contempt which came before the trial court for a hearing in March 1996. The Motion to Compel dealt with the issue of the Smiths' failure to attend scheduled depositions and the Motion for Contempt dealt with the Petitioners' activities in repairing the dam. On the day of the hearing, Petitioner and

Gwinnett County reached an agreement that resolved all issues involved in the two motions and the parties announced this settlement to the court.

The trial court entered a Consent Order on March 25, 1996. (Appendix). The Consent Order provided that the Petitioners shall, within two weeks, retain a licensed engineer who is knowledgeable in the field of dam reconstruction, and that this engineer shall, within thirty days of being retained by Petitioners, render a written report concerning the safe reconstruction of the dam on the Freeman Lake Property. The parties agreed on six parameters to be encompassed in this engineering study. The Consent Order further provided that the Petitioners, within thirty days of the issuance of their engineer's report, shall commence the repair of the dam so as to accomplish the restoration of Freeman Lake in accordance with regulations promulgated by the ACOE, the FEMA, and the engineer's report. The Consent Order authorized the County's chief engineer to "monitor" all construction activity

concerning the repair of the Freeman Lake Dam. The Consent Order did not require Petitioners to obtain a Land Disturbance Permit from the County to repair the dam.

(4) ORDER FOR CONTEMPT, INJUNCTIVE, AND OTHER EQUITABLE RELIEF: Subsequent to the March 1996 hearing date, Respondent filed a Motion for Contempt raising the Petitioners' alleged failure to retain the engineer and to have his report issued and to commence the repairs within the timetable set forth in the Consent Order. A hearing was held on July 18, 1996, and after hearing evidence relating to the delays, the court continued the hearing for thirty days and it would evaluate the progress at that time.

Another evidentiary hearing on the contempt issue was eventually held on October 4, 1996. However, before this hearing, Respondent amended its motion. Respondent alleged at this hearing that Petitioners were clearing trees, grading and excavating on the Arcadia Drive side and elsewhere on the Freeman Lake Property without a Land

Disturbance Permit. Respondent further alleged that this activity destroyed the required natural zoning buffer area. Respondent alleged that this activity was unrelated to the repair of the dam that was located on the Plantation Lane side of the Freeman Lake Property and was in violation of the Interlocutory Injunction. Respondent also raised the issue that the Petitioners ruptured a sewer line and would not allow County workers to repair it. Respondent alleged that the Freeman Lake Property was a nuisance. (10/4/96 T.).

Petitioners argued that they were not required to obtain a County Land Disturbance Permit to repair the dam pursuant to the Consent Order and that the challenged clearing of trees, grading and excavating activities were undertaken solely to repair the dam as they were required to do pursuant to the Consent Order. Petitioners removed the dirt from this area because there was no other place on the Freeman Lake Property where the dirt could be removed. Petitioners argued that the County's engineer was ordered to

only monitor the construction and he had no authority to control the actual repair activities. The Petitioners argued that the Consent Order resolved all issues between the parties and superseded the Interlocutory Injunction. (10/4/96 T.).

Respondent's chief engineer had reviewed the Petitioners' engineering study and he had expressed no dissatisfaction with the study directly to the Petitioners or their engineer. Respondent did not contend that the Petitioners had failed to comply with the requirements of the engineering study. Respondent did not provide Petitioners with specifications or requirements in order to finish the repair of the dam to the County's satisfaction other than reference to County "development regulations". The County had no requirement that the repair of an existing dam must comply with specific developmental regulations. The County's chief engineer admitted that, because the repairs were nearing completion, the dam was in a safer condition than it was in March 1996. (10/4/96 T.).

The trial court entered an Order for Contempt, Injunctive, and Other Equitable Relief on October 15, 1996. (Appendix). The court held that the Interlocutory Injunction continued in full force and effect and was not superseded by the Consent Order. The court found that the Consent Order authorized Petitioners to repair the dam without the necessity of obtaining a Land Disturbance Permit.

However, the trial court found that the Petitioners willfully violated the Interlocutory Injunction by knocking down trees, grading and excavating on the Freeman Lake Property without first obtaining the required County Land Disturbance Permit and that these activities were unrelated to the repair of the dam and this occurred in an area where the dam, as defined by the Respondent, did not extend. The trial court found that the Petitioners violated the required seventy-five foot natural buffer area adjacent to the residential areas by removing the trees. The court also found that the Petitioners were in contempt because they did not allow

County employees access to the Freeman Lake Property and because Petitioners ignored the recommendations and suggestions of the County's chief engineer who had been monitoring the construction activities. The trial court held the Petitioners in contempt and the Smiths were each ordered to pay a $500.00 fine and incarcerated for twenty days.

The trial court's order went far beyond a finding of contempt. The trial court took control over the Freeman Lake Property pursuant to its equitable powers. O.C.G.A. 23-1-7. The court ordered that the County would now control the repair of the dam and its employees could enter the Freeman Lake Property without fear of trespass to restore the buffers and to restore Freeman Lake to its condition and dimension prior to the Smiths' breach of the dam. The court designated an investigator with the County district attorneys office as a monitor to oversee the repair of the dam and the restoration of Freeman Lake and the buffers. The court ordered that the repairs and restoration was to be completed

within ninety days, but an extension could be obtained for good cause.

The court further ordered that the County was to recover from Petitioners all reasonable costs incurred in completing the repair of the dam and restoring the lake and buffers, and if necessary, to recover all costs incurred to bring this project to completion in compliance with applicable local, state, and federal regulations and requirements. The court also awarded reasonable attorneys fees to Respondents in bringing the contempt action and would consider attorneys fees for future services relating to the repairs and restoration. The court authorized that the County could attach the Freeman Lake Property for the costs associated with the repair of the dam and the restoration of the lake and buffers. O.C.G.A. 23-4-37.

The trial court concluded that, as a matter of law, Gwinnett County's efforts in repairing the dam and restoring Freeman Lake and the buffers do not constitute a taking of

the Freeman Lake Property but "merely constitute an exercise of the County's police powers to protect the health, safety, and welfare of County residents."

Since the time of the October 1996 contempt hearing, the trial court has authorized the expenditure of substantial sums for the County to repair the dam and restore Freeman Lake and the buffer areas. For example, the trial court authorized the County to proceed with the removal of downed trees and woody debris at a cost not to exceed $75,373.25 , and to backfill ditches in the lakebed, and to complete the stabilization of buffer areas at an additional cost not to exceed $197,060.00. (Appendix). Expenditures could reach an estimated total of approximately $500,000.00.

(5) PRESERVATION OF ISSUES: Petitioners raised the issue of a taking in the trial court which was specifically addressed in the Order for Contempt, Injunctive, and Other Equitable Relief and the trial court found that there was no taking. (Order p. 8). Petitioners appealed to the

Georgia Supreme Court from the trial court's Order for Contempt, Injunctive, and Other Equitable Relief and raised the taking issue. The Georgia Supreme Court addressed this issue and held that there was no inverse condemnation or taking and the trial court acted within its equitable powers in taking control of the Freeman Lake Property and assessing costs against it. Smith at al. v. Gwinnett County, supra, 268 Ga. at 181.

ARGUMENT

The Georgia Supreme Court erred in affirming the trial court's finding that the October 1996 Order for Contempt, Injunctive and Other Equitable Relief did not result in an inverse condemnation and a taking which requires just compensation to the Petitioners. This Court should reverse the Georgia Supreme Court and remand to the trial court for a hearing consistent with the Takings Clause cases decided by this Court and cited herein.

A. The Takings Clause of the Fifth Amendment to the

United States Constitution, made applicable to the States through the Fourteenth Amendment, Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), provides, "nor shall private property be taken for public use, without just compensation." The Takings Clause guarantee of the Fifth Amendment is designed to bar the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). This Court has frequently observed that this issue depends largely upon the particular circumstances in each case. United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958).

Seventy-five years ago, Justice Holmes first observed that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43

S.Ct. 158, 160, 67 L.Ed. 72 (1922). Petitioners' case is an example where the government regulation of property has gone "too far."

This Court has not developed any set formula for determining when government regulation has gone "too far" and justice and fairness require a finding that a taking has occurred and the economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See Goldblatt v. Hempstead, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962). However, in engaging in these essentially ad hoc, factual inquiries in each case, this Court has identified several factors that have particular significance; (i) the economic impact of the regulation on the claimant; (ii) the particular extent to which the regulation has interfered with the claimant's distinct investment-backed expectations; and (iii) the character of the government action. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124, 98

S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). In Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), this Court also required that the governmental regulation under scrutiny must substantially advance a legitimate state interest. See also Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), this Court considered the nexus or degree of connection between the challenged government regulation and the legitimate state interest sought to be achieved. This Court required a "reasonable relationship" or more specifically, a "rough proportionality," and held that a taking would result from such regulatory action if, after an individualized determination, the regulation is not related both in nature and extent to the legitimate state interest sought to be achieved.

Despite this general case by case approach, the Court has consistently identified at least two categories of

regulatory action as compensable without case specific inquiry into the public interest advanced in support of the restraint. The first category encompasses regulations that compel the property owner to suffer a physical invasion of his property. In general, at least with regard to permanent invasions, no matter how minute the intrusion and no matter how weighty the public purpose behind it, there is a taking and compensation is required. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). This Court considers a physical intrusion by the government to be a property restriction of an unusually serious character for purposes of the Takings Clause, and in such cases, the character of the government action is the determinative factor. When faced with a permanent physical occupation of real property, as opposed to a temporary invasion, this Court has invariably found a taking, without regard to whether the governmental action achieves an important public benefit or has only minimal

economic impact on the owner.

The second situation in which this Court has found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See Agins v. Tiburon, 447 U.S. at 260, 100 S.Ct. 2141; See also Nollan v. California Coastal Commission, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987). The notion that a valid exercise of the police power is ipso facto not a taking requiring compensation was rejected by this Court in Nollan if the regulation denies all economic or productive use of the land.

In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), while conceding that in previous cases no compensable injury had been found when the regulation under scrutiny was designed to prevent "harmful or noxious uses," this Court suggested that this analysis was simply the progenitor of the Court's more contemporary statements that land use regulation does

not effect a taking if it substantially advances legitimate state interests. The Court emphasized that the regulation deprived the landowner of all economically beneficial uses of the property, and in Lucas, this Court also noted that regulations that leave the owner without economically beneficial or productive options for the land's use, typically by requiring the land to be left substantially in its natural state, carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. 505 U.S. at 1018, 112 S.Ct. at 2895.

These decisions emphasize that this Court will now carefully scrutinize the exercise of the police power and if the regulatory action precludes all economically beneficial use of the property or results in a permanent physical occupation, the fact that the regulation substantially advances a legitimate state interest is not enough to deprive a landowner of just compensation. If the use is not "nuisance-like" then the landowner is entitled to just compensation for the property

effectively acquired and taken by the governmental authority.

B. Applying these factors to the facts of this case demonstrates that the Freeman Lake Property was "taken" for public use from the Petitioners within the meaning of the Takings Clause of the Fifth Amendment and there must be just compensation. This Court has found that the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests, when it results in a permanent physical occupation of the property, or when the challenged regulation denies an owner all economically viable use of his land. All of these considerations are present in the Petitioners' case.

The Georgia Supreme Court's decision attempts to justify the extreme actions taken by Gwinnett County as a valid exercise of police powers to protect the health, safety, and welfare of the citizens the County. The court found that the trial court's giving the County control over the Freeman Lake Property, the repairs to the dam and the restoration of

the lake and buffers and imposing all costs on Petitioners was not a taking but an exercise of the court's equitable powers. However, the basis for the trial court's order was not an unsafe dam caused by Petitioners' repair activities or the dangers resulting therefrom. The October 4, 1996 contempt hearing did not involve allegations by Respondent that the repairs to the dam were not moving toward completion, were not in accordance with the engineering study, or that the dam was in a less safe condition than before. There was no evidence of a nuisance resulting from an unsafe dam, an emergency, or any imminent danger to the public's health, welfare or safety.

Rather, the October 1996 hearing and the finding of contempt only involved issues of grading of land and clearing of trees in areas away from the dam and with the destruction of zoning buffer areas between commercial property and residential property. These are not matters which justify the extreme action taken by the trial court in taking control of the

entire Freeman Lake Property from the Petitioners and authorizing the Respondent to control the repair of the dam and restoration of the Freeman Lake, to the exclusion of the Petitioners, and to assess costs against the Petitioners' property under equitable powers. The Petitioners' alleged violations of buffer areas did not create a nuisance or any immediate danger to the health, safety and welfare of the citizens living near the Freeman Lake Property. This government regulation of Petitioner's property does not substantially advance the state's interests of ensuring safe dams, preventing flooding, or abating nuisances. This action is an impermissible use of the County police powers and is an impermissible exercise of the court's equitable powers which resulted in a taking of Petitioners' property for public use.

The court order authorizing Gwinnett County to complete the repairs to the dam and restoration of Freeman Lake results in the government placing a permanent and fixed structure, the dam, on the Freeman Lake Property. Implicit

in the court order is the conclusion that when these court imposed repairs to the dam and restoration of Freeman Lake are completed by Gwinnett County, the Petitioners may not change or remove it. As a result, the Freeman Lake Property will hereinafter consist of Freeman Lake and the structured dam as constructed by Gwinnett County pursuant to the court order. Petitioners have been excluded from control over the repairs to the dam on their property. This results in a permanent physical occupation of the Petitioners' Freeman Lake Property by the government in the form of a court-ordered government built dam.

This also forces the Petitioners to forego any potential development opportunities on the Freeman Lake Property because they are now required to maintain the lake and government built dam on their commercial property. The Petitioners have been denied all economically viable uses of the property. The Petitioners are now required to maintain the Freeman Lake Property substantially in its natural state,

that being a large lake. The Petitioners' investment-backed expectations have been defeated. This governmental action had a severely detrimental economic impact on Petitioners. Adding to the detrimental economic impact upon Petitioners is the substantial lien that will be placed on the property by Gwinnett County for the costs of the repairs to the dam.

C. There was a taking of Petitioners' Freeman Lake Property for public use when the court took control over the entire Freeman Lake Property, authorized County employees access to the Property, gave the County control of the completion of the repairs to the dam and restoration of Freeman Lake to the exclusion of the Petitioners, and authorized the County to assess all costs against Petitioners' property. This was a taking of the Petitioners' Freeman Lake Property.

An owner's "bundle" of property rights are the rights to "possess, use and dispose of it." United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89

L.Ed.2d 311 (1945). Petitioners lost the right to possess and use their property and they have been totally excluded from the opportunity to influence and control the repair and restoration activities on their land. Furthermore, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property. Dolan v. City of Tigard, supra. Petitioners have been excluded from their own property rather than having the right to exclude others. Petitioners' ability to dispose of the property was seriously abridged, not only by the requirement that the dam be maintained as constructed by the County, but because when the court-ordered repairs and restoration is completed by the County, there will be a substantial lien on the property for these costs, and Petitioners will be unable to dispose of it until these assessments are fully paid and satisfied.

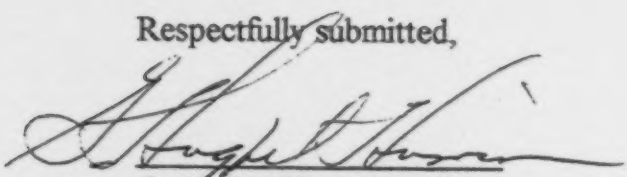
D. Gwinnett County's actions show a clear intent to require the Petitioners to maintain a lake and dam on the Freeman Lake Property. While the County claims that it has

no desire to acquire the Freeman Lake Property, the County has intended from the outset to preserve Freeman Lake for the benefit of the public. Gwinnett County has accomplished this end through the use of development regulations, police powers, and the contempt powers of the court. If Gwinnett County wishes to take Petitioners' property so that the aesthetic and other benefits from Freeman Lake flow to its citizens, the Constitution requires that the County must pay Petitioners just compensation. The Fifth and Fourteenth Amendments do not permit the County to impose this public burden on Petitioners alone rather than the public as a whole.

This case can be summed up by quoting language from this Court's opinion in Nollan v. California Coastal Commission, supra, that the County's actions were not a valid regulation of land use but an "out-an-out plan of extortion." 483 U.S. at 837, 107 S.Ct. at 3149. This Petition for Writ of Certiorari should be granted.

(Signature page follows).

Respectfully submitted,



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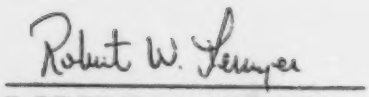

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